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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, A. D. 1951.

No. [redacted]720

LEROY G. CHARLES, JOHN L. CHARLES, MARY E. CHARLES, WOODROW CHARLES, DOCK CHARLES, EUGENE CHARLES AND GRADY JONES,

Petitioners,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois.

REPLY BRIEF FOR PETITIONERS.

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Chicago, Illinois.

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VS.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois.

REPLY BRIEF FOR PETITIONERS.

May it please the Court:

The respondent has refused to support the second decision of the Supreme Court of Illinois, which held that the obnoxious ordinance attacked, was not repugnant to the Federal Constitution (R. 44). The respondent brushed

the federal question aside by ignoring it. If the respondent ignores it, it does not exist and cannot be considered by this court. That is the position taken by the respondent in this case.

I

The second decision of the Supreme Court of Illinois upholding the ordinance under attack is contrary to the decisions of this court and deprived the petitioners of substantial property rights which are guaranteed to them by the 14th Amendment to the United States Constitution.

Hague v. *C. I. O.*, 307 U. S. 496, 530-31

Nor. Car. R. R. Co. v. *Zachary*, 232 U. S. 248, 257-59

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II

The second decision of the Supreme Court of Illinois upheld the arbitrary suppression of legitimate and harmless businesses and the arbitrary discrimination against retail live poulterers in violation of the 14th Amendment to the Constitution of the United States.

Allen v. *Smith*, 173 U. S. 389

Walling v. *De Soto Creamery and Produce Co.*, 51 F. Supp. 938, 943

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Dobbins v. *Los Angeles*, 195 U. S. 223, 236-37

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III

The second decision of the Supreme Court of Illinois on a part of the decree unrelated to the issues raised on the appeal, which part was a separate adjudication in equity, in violation of the positive rule and settled decisions of that court, deprived the petitioners of a review by the established and settled law, procedural and substantive and denied them due process of law and equal protection of the law.

Conant v. *Lansden,* 409 Ill. 149, 152-3

Heine v. *Degen,* 362 Ill. 359, 380

(a) Theft is a crime and a municipality cannot punish crime and cannot make investigations, which are not to aid the city council in legislation.

Kilbourn v. *Thompson,* 103 U. S. 168, 190

In re *Ellis,* 28 N. Y. S. (2d) 988

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I

The second decision of the Supreme Court of Illinois upholding the ordinance under attack is contrary to the decisions of this court and deprived the petitioners of substantial property rights which are guaranteed to them by the 14th Amendment of the United States Constitution.

On page 2 of its brief, the respondent said that no Federal question was involved herein. The petitioners asserted that they were denied equal protection of the laws of the United States (R. 11); that the ordinance violated the 5th and 14th Amendments to the Constitution of the United States and deprived them of their property without due process of law (R. 12-13). The second decision of the Supreme Court of Illinois held that the rights of petitions guaranteed by the Federal Constitution were not violated by the ordinance under attack (R. 44). In the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 544-5, this court said when it is claimed that a state enactment is invalid under the United States Constitution and that claim is sustained or rejected, this court will review the judgment at the instance of the unsuccessful party.

In the case of *Hague* v. *C. I. O.*, 307 U. S. 496, 530-31, this court said, when suit is brought to restrain the enforcement of a statute, which is an infringement of the equal protection clause of the 14th Amendment, a Federal question is involved.

In the case of *Nor. Car. R. R. Co.* v. *Zachary,* 232 U. S. 257-59, the North Carolina Supreme Court held that a certain Federal act did not apply. This court held that plaintiff was entitled to the benefit of the asserted Federal right and reversed the case.

On pages 2 and 3 of its brief, the respondent quoted the preamble of the ordinance as authority. This matter is answered on pages 38 and 39 of our Petition for Certiorari. But we add that everything mentioned in the preamble as creating a nuisance, except the feathers, is found in every retail dressed poulterers establishment next door to that of the retail live poulterer. In the case of *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 290, this court said that the preamble is not legislation, but is a recital of the considerations, which in the opinion of the legislative body justified the legislation. However, the preamble in the case at bar is important because it makes clear the pure assumption by the City Council that the same refuse, entrails and blood, which create a nuisance in a retail live poultry establishment create only wholesome and sanitary conditions in a retail dressed poultry establishment.

The admitted facts clearly establish that retail dressed poulterers clean, pluck and eviscerate poultry and cause refuse, entrails and blood to remain in their establishments (R. 9-10). The only refuse, which is not in retail dressed poulterers' stores and is found in retail live poulterers' stores, is feathers. The amount of blood depends upon the amount of business done.

There was no discrimination in the case of *Roich* v. *Board of Com'rs. of Union City,* 168 Atl. 165, cited by the Illinois Supreme Court (R. 45), and by the respondent on page 3 of its brief. In that case the health officer denied

all applications for licenses for that particular building. However, so long as we have a government of law and not of men, the likes and dislikes of a health officer cannot override our Federal Constitution and deprive thrifty citizens of their inalienable rights under that constitution.

The cases of *Paterson* v. *Johnson*, 214 Ill. 481 and *Wadleight* v. *Gilman*, 12 Me. 405, cited on pages 3 and 4 of respondent's brief, deal only with the power of a city to forbid any use of dangerous and unsafe buildings. These cases do not deal with arbitrary discrimination in any form.

II

The second decision of the Supreme Court of Illinois upheld arbitrary suppression of legitimate and harmless businesses and the arbitrary discrimination against retail live poulterers in violation of the 14th Amendment to the Constitution of the United States.

We wish to make it clear that we have never objected to the provisions of the ordinance affecting the handling, cleaning and storing of crates.

On page 10 of its brief, respondent said that we never contended below that wholesale poulterers are permitted to operate in business districts in Chicago. We argued this question generally in point one of our brief filed in the Supreme Court of Illinois. But we quoted both ordinances on pages 10 and 11 of our answer to the brief of the amicus curiae, which answer is a part of the record filed herein. We copied sections 194A-11 and 194A-12 from said answer into our Petition for Certiorari filed herein on pages 10 and 11.

We contend that the term "wholesale produce market," found in section 194A-11 of the City Code (Petition for Certiorari page 26) was used in its ordinary and comprehensive economic sense, and that the term includes wholesale poultry markets. In the case of *Walling* v. *De Soto Creamery and Produce Co.*, 51 F. Supp. 938, 940-43, the court found as a fact that the produce company's employees, who were engaged in buying, handling, feeding, slaughtering and picking poultry were paid less than the minimum wages.

On page 4 of its brief, the respondent cited the case of *King* v. *Davenport*, 98 Ill. 310, dealing with slaughter-houses and unwholesome trades. We are dealing here with food markets and not slaughter-houses or trades. In the case of *Bird* v. *Grout*, 94 N. Y. S., 127, 128, market lands could be conveyed or leased only for market purposes. The court enjoined the leasing of a part of the market land for a slaughter-house, because the lease was not for a market purpose.

The Illinois Supreme Court apparently misread or misunderstood section 194A-12 (2) of the Municipal Code of Chicago, of which it took judicial notice (R. 47). That court said under that ordinance, wholesale live poultry dealers may operate only in a manufacturing district. We are dealing here with wholesale and retail live poultry markets in the City of Chicago. Section 194A-12 (2) of the ordinance relied upon by the court confines to manufacturing districts only those, who raise, breed, hatch, kill, pack and store small animals and poultry for wholesale distribution (Petition for Certiorari page 26). The word market is not used anywhere in section 194A-12 (2) of that ordinance. It is clear from the very language of that ordinance that it deals with and is applicable only to

manufacturers and producers. In the case of *Charles March and Co.* v. *Higgins*, 36 F. Suppl. 792, 795, the court said:

> "Manufacture implies a change but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary as set forth and illustrated in *Hartranft* v. *Wiegmann*, 121 U. S. 609, 7 S. Ct. 1240, 30 L. Ed. 1012. There must be transformation; a new and different article must emerge, 'having a distinctive name, character, or use.'" (Emphasis by the court).
>
> In *Allen* v. *Smith*, 173 U. S. 389, 19 S. Ct. 446, 43, L. Ed. 741, the Supreme Court held that under the particular statute before it there was no legal distinction between "manufacturer" and "producer." I see no compelling reason for placing a different construction on the terms in the instant case.

In the case of *New Orleans* v. *Morris*, 18 Fed. Cases 111, 113, the court said:

> "Although a market may not be a locus publicus in the sense that the ownership of the soil is necessarily vested in the public, still it is a public place in this sense. It is a place to which all persons have a right to resort daily to supply themselves with such provisions and necessaries as are there vended."

On the same page the court further said:

> "The method was that of a market, the matter entirely distinct. But the whole power of the city over markets springs from the fact that vegetables and meats liable to decay and putrefy are therein sold daily in large quantities; these being excluded from the place, it loses the essential quality of a market as it is defined in our jurisprudence."

In the case of *Roland Co.* v. *Walling,* 326 U. S. 657, 674, this court said:

> "Wholesaling includes all marketing transactions in which the purchaser is actuated solely by a profit or business motive in making the purchase. Retailing includes all marketing transactions in which the purchaser is actuated solely by a desire to satisfy his own personal wants or those of his family or friends through the personal use of the commodity or service purchased. (Beckman and Engle in Wholesaling Principles and Practice (1937) p. 25)."

Section 194A-11 (2) of the zoning ordinance, which was quoted and discussed, but ignored by the Supreme Court of Illinois, provides that, "a wholesale produce market," is permitted in business districts in Chicago (Petition for Certiorari page 26). The zoning ordinance relied upon by the Illinois Supreme Court is wholly unrelated to markets and marketing. It is wholly inapplicable to any issue in the case at bar. We concur in the statement made by respondent on page 11 of its brief, that the term, "wholesale produce market" used in section 194A-11 of the ordinance, does not allow a slaughter house in a commercial district. But, we again remind respondent that a slaughter house is not a market and has no market purpose. *Bird* v. *Grout,* 94 N. Y. S. 127, 128. Section 194A-11 deals with markets and section 194A-12 (2) deals with and applies to manufacturers, producers and slaughter houses, and confines them to manufacturing districts.

We quote from the brief of the real party in interest in this cause, the wholesale poulterers in Chicago, who call themselves Amicus Curiae, page 10:

> "Plaintiff and all other persons can purchase at either wholesale or retail, poultry which is already slaughtered and the feathers removed and can buy poultry which is drawn and not be restricted or affected by the ordinance. The question as to whether

the handling of poultry—*in which the entrails have not been removed—produces filth and unsanitary conditions in one of fact.*"

"It is common knowledge that live poultry comes into Chicago from other areas and from other states, and is brought to the wholesaler from the farms. These wholesalers are engaged in interstate commerce."

Page 11 of the same brief:

"These wholesalers engaged in the poultry business have the live poultry brought to them. The live poultry is delivered in coops to the retail stores. These coops are taken into the retail stores."

This shows conclusively that the wholesale poulterers are not subject to or operating under Section 194A-12 (2) of the ordinance relied upon by the Illinois Supreme Court.

We refer this court to point IV, pages 39-43 of our Petition for Certiorari for further discussion of the Illinois Supreme Court's construction of the ordinance under attack. The City council intended that said ordinance and its prohibitions be effective as an entirety throughout the City of Chicago. The Illinois Supreme Court mutilated or amended the ordinance by construction and made it a fractional part of what the council intended, and made its validity dependent upon a wholly unrelated zoning ordinance. If the zoning ordinance is amended or repealed, what will be the status of the ordinance under attack?

III

The second decision of the Supreme Court of Illinois on a part of the decree unrelated to the issues raised

on the appeal, which part was a separate adjudication in equity, in violation of the positive rule and settled decisions of that court, deprived the petitioners of a review by the established and settled law, procedural and substantive and denied them due process of law and equal protection of the law.

On pages 29 to 33 of our Petition for Certiorari, we discussed the departure of the Supreme Court of Illinois from both procedural and substantive law to consider and reverse that part of the decree, which was a separate adjudication in equity and not involved in the appeal. On page 13 of its brief, the respondent feebly defended the court's action. The notice of appeal limited the appeal to the portions of the adjudications of the decree adverse to petitioners. The adjudication invalidating section 95-29.8 of Chapter 95 of the Code, etc. was specifically excepted from the appeal (R. 28-29). No cross-appeal was filed by respondent. On pages 29 and 30 of our Petition for Certiorari, we cited *Heine* v. *Degen*, 362 Ill. 359, 380, which quoted Rule 35 (1) of the Illinois Supreme Court showing that such action by that court could not legally be taken. In the case of *Conant* v. *Landsden*, 409 Ill. 149, 152-3, the court said:

> "It is true, as plaintiffs insist, that a cross appeal was taken in this case to the Appellate Court. But the questions presented remain separate and independent, and the rule referred to applies to further review by this court as well as to the initial review by the Appellate Court. Defendent's appeal brings nothing to this court except the decision of the Appellate Court concerning the surcharges and other matters to which his assignments of error are directed. While an appellee may assign cross errors on matters brought before this court by an appellant,

> cross errors cannot be assigned as to separate parts of a decree not brought before the court by appeal, even though the entire case was passed upon by the Appellate Court. (*Walker* v. *Montgomery,* 236 Ill. 244). The motion of defendant is, therefore, granted, except as to cross error No. 5, and the other cross errors will not be considered."

(a) Theft is a crime and a municipality cannot punish crime and cannot make investigations, which are not to aid the city council in legislation.

The respondent said on page 13 of its brief that the adjudication of the Supreme Court of Illinois cannot be reviewed by this court, but did not say why. The second decision of the Supreme Court of Illinois not only denied petitioners due process of law and equal protection of the law (Petition for Certiorari, pages 29 to 33), but sanctioned that, which is definitely erroneous. The Illinois court said the petitioners should have introduced evidence to prove the admitted facts (R. 48). This holding denied petitioners due process of law and equal protection of the law. (Petition for Certiorari pages 28 to 33).

The Illinois court said in its second decision that this section was designed to enable the municipal authorities to control the traffic in stolen and diseased poultry (R. 48). This is wholly inconsistent with the preamble of the ordinance (R. 17-18), which does not mention either diseased or stolen poultry. The preamble states the reasons for enacting the ordinance. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 290.

Furthermore, the City council cannot legislate to define and punish crime and therefore cannot authorize the investigation of crime. In the case of *Kilbourn* v. *Thompson*, 103 U. S. 168, 195, this court said that the House of

Representatives could not investigate any matter, if the investigation could not result in valid legislation on the subject to which the inquiry referred.

In the case of *United States* v. *Owlett*, 15 F. Supp. 736, the court held that the investigatory power of a legislative body is limited to obtained information on matters that fall within its proper field of legislative action. The same statement is found in 9 A. L. R., at page 1341.

In the case of *In re Ellis*, 28 N. Y. S. (2d) 988, the court said:

> "The power of the Legislatures to make investigations is limited to such investigations as are in fact auxiliary to and in aid of the legislative function, and does not extend to general investigations into private affairs."

In the case of *People* v. *Burnett*, 394 Ill. 420, 425, the Court said:

> "The legislature has authority to define what acts shall constitute a crime. In the exercise of the sovereign power of the State, it may fix the punishment to be imposed for the commission of the crime and in doing so the only constitutional limitation on its authority is that "all penalties shall be proportioned to the nature of the offense."

In the case of *State ex rel. Keefe* v. *Schmiege*, 28 N. W. 2d 345 at 346. (Supreme Court of Wisconsin 1947) the court said:

> "The legislature has power to vest in a county board or municipal council power to provide for good order of community by enacting ordinances regulating local affairs, provided there is not included the power in either to create crimes and impose criminal punishment."

In 36 Georgetown Law Journal (Vol. 36) p. 433, it is stated:

> "(1) only the sovereign can create a crime; (2) a county or municipality is not a sovereign; (3) a county or municipality cannot create a crime."

In the case of *Winchester* v. *Redmond,* 93 Va. 711, 715-16, the court said:

> "Crime is an offense against the State, and not against the city, town, or county in which it may be committed, as distinguished from the rest of the State. The offense is against the sovereign authority, and not against the individual or particular community. All the people of the State are concerned in the punishment and suppression of crime. And the State, whose prerogative it is to punish crime, has made adequate provisions for the vindication of the public justice. When a crime has been committed, it is her law, and not that of the corporation, that is broken. She has prescribed penalties for the various species of crime, and enacted laws for the arrest, trial, and punishment of criminals. They are arrested by her officers, and tried by her judiciary under her laws. The State constantly makes use of officers of the corporation in the discharge of its governmental functions, and requires them to perform, within the corporate limits, duties not strictly or properly local or muncipal in their nature. In the performance of such duties, they exercise State powers, and are in that respect State officers. As was said by Judge Staples in *Burch* v. *Hardwick,* 30 Gratt. 24, 34."

We wish to supplement what we said on pages 29 to 33 of our Petition for Certiorari as further answer to respondent. The ordinance does not require either farmers or wholesalers, who sell live poultry to retailers to give any information concerning or certify to the number, breed, description or distinguishing marks of the poultry

(R. 27). If a thief sold stolen poultry, or if a crook sold diseased poultry to a retailer, he would deny any record of the breed, number, distinguishing marks and description made by the retailer. The thief or crook never would admit that he sold any of the proscribed poultry. This would be the situation of the retail live poulterer under the unwarranted assumption of the Supreme Court of Illinois in its second decision to the effect that the traffic in diseased and stolen poultry is confined to retail live poultry dealers.

Section 95-29.8 of the obnoxious ordinance, insofar as retail live poultry dealers are concerned, provide in the minutest detail a comprehensive and exhaustive system of book-keeping concerning all poultry bought by them and all vehicles delivering poultry to them and all persons, who sell poultry to them (R. 27). The provision is wholly inapplicable to retail poulterers, because they buy in small quantities and are definitely established in a certain community and maintain a personal and close relationship with their customers. Any unfair or fraudulent practices on the part of the retailer would be readily discovered. This provision should appropriately apply to wholesale dealers, who buy in large quantities by wire and telephone and often re-consign the poultry before it is delivered to them. Therefore open accounts are necessary and the opportunity for fraud is evident.

Wherefore, the plaintiffs, the petitioners, respectfully pray that a writ of certiorari issue to the Supreme Court of Illinois, and that the second decision of that court, rendered in this cause, be reversed and held for nought.

LeRoy G. Charles,
Attorney for Petitioners.